

A Bauer (M) Sdn Bhd v Percon Corp Sdn Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO R1–
25–62 OF 2002

RAUS SHARIF J

9 JUNE 2003

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Arbitration — Award — Setting aside — Approach of courts in setting aside arbitration awards — Whether discretion to set aside awards to be lightly exercised — Discretion of arbitrator as to the conduct of arbitration — When such discretion to be reviewed by courts

C

Legal Profession — Duty to client — Arbitration proceedings — Whether advocate and solicitor owes same duty to client as in a court of law where matter is for arbitration

Legal Profession — Duty to client — Conflict of interests — Whether advocate and solicitor obliged to avoid conflict of interest in arbitration proceedings

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The applicant and respondent referred their dispute over a highway construction project (‘the project’) to arbitration. The respondent raised a preliminary objection, objecting to Messrs CK Oon & Co acting as solicitors for the applicant in the arbitration. The respondent contended that one Mr Oon Chee Keong (‘Mr Oon’) of the said firm of solicitors, had acted as legal counsel to a different arbitrator in an

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earlier arbitration involving the respondent and a different party in respect of a dispute arising out of the same project. The respondent contended that Mr Oon being privy to the earlier arbitration proceeding as legal counsel to the arbitrator should not act against it as counsel for the applicant in the current arbitration proceeding. The arbitrator in the current arbitration proceeding, after considering the

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written submissions of both applicant and respondent made an interim award directing that Mr Oon should not act as counsel and that Messrs CK Oon & Co should not act as the firm of solicitors for the applicant. According to the arbitrator, Mr Oon was privy to documents related to the earlier arbitration and owed a duty to the parties in the earlier arbitration wherein the respondent was a party.

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The arbitrator was of the view that Mr Oon should not put himself in a position where there would be a risk of breach of confidentiality or privacy. If he continued as counsel for the applicant in the current arbitration, there would be no certainty that the confidentiality and privacy of the earlier arbitration would be preserved, opined the arbitrator. The arbitrator also held that Mr Oon, being a practising

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advocate and solicitor of the High Court of Malaya was bound by the Legal Profession Act 1976 and the Legal Profession (Practice and Etiquette) Rules 1978, in particular rr 4 and 5(a). The applicant thus applied to the High Court to set aside the interim award contending that the arbitrator had no jurisdiction to make such an award and

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further submitting that there had been breaches of the rules of natural justice. It was also submitted on behalf of the applicant that the Legal Profession Act 1976 and the Rules did not apply to arbitration

proceedings on the authority of *Zublin Muhibbah Joint Venture v Government of Malaysia* [1990] 3 MLJ 121. **A**

Held, dismissing the applicant's application with costs:

- (1) An arbitrator's award may be set aside for errors of law on the face of it, though the jurisdiction is not lightly to be exercised. The arbitrator has, in general, a discretion as to the manner in which the arbitration is to be conducted. The court will not review the arbitrator's discretion provided he acts within his authority and according to the principles of justice and behaves fairly to each party. On the facts, the High Court was not persuaded that the arbitrator had misconducted himself or the proceedings or the arbitration or award had been improperly procured. The arbitrator had the jurisdiction and power to determine the preliminary issues raised by the respondent (pp 210E–F, 211A). **B**
- (2) The circumstances in *Zublin Muhibbah Joint Venture v Government of Malaysia* [1990] 3 MLJ 121 were different from the situation in the present case. In the present case, the issue was with regard to the conduct and duty of an advocate and solicitor. An advocate and solicitor owes the same duty to his client or former client whether or not he is before a court or an arbitration proceeding. He must avoid any conflict of interest. He must ensure that confidential information he obtains from his relationship with his client is later not used against his client in any circumstances. This is important because for the proper administration of justice, a client should be able to have complete confidence that what he tells or gives his lawyer will remain a secret. Thus on the facts, the arbitrator was not wrong in concluding that Mr Oon should not act as counsel and the firm Messrs CK Oon & Co should not act as solicitors for the applicant in the current arbitration proceeding (see p 212C–E); *Zublin Muhibbah Joint Venture v Government of Malaysia* [1990] 3 MLJ 121 distinguished. **C**
- (3) The submission that there had been breaches of the rules of natural justice was a mere allegation. On the facts, both parties were given equal opportunities to present their arguments which led to the publication of the interim award (see 212G). **D**

[Bahasa Malaysia summary]

Pemohon dan responden telah merujuk pertikaian mereka berhubung satu projek pembinaan jalanraya ('projek tersebut') kepada timbangtara. Responden telah menimbulkan satu bantahan awal, membantah kepada Tetuan CK Oon & Co bertindak sebagai peguamcara bagi pihak pemohon dalam timbangtara tersebut. Responden telah berhujah bahawa En Oon Chee Keong ('En Oon') dari firma peguamcara tersebut, telah bertindak sebagai peguam kepada penimbangtara lain dalam satu timbangtara sebelum ini yang **E**

- A melibatkan responden dan pihak yang lain berhubung satu pertikaian yang timbul daripada projek yang sama. Responden berhujah bahawa En Oon yang bersubahat dengan prosiding timbangtara sebelum ini terhadapnya sebagai peguam untuk penimbangtara tersebut tidak sepatutnya bertindak terhadapnya sebagai peguam bagi pihak pemohon dalam prosiding timbangtara semasa. Penimbangtara dalam prosiding timbangtara semasa, setelah menimbangkan hujah-hujah bertulis kedua-dua pemohon dan responden telah membuat satu award interim mengarahkan En Oon tidak bertindak sebagai peguamcara dan Tetuan CK Oon & Co tidak bertindak sebagai firma peguamcara bagi pihak pemohon. Menurut penimbangtara, En Oon bersubahat terhadap dokumen-dokumen yang berkaitan dengan timbangtara sebelum ini dan mempunyai kewajiban terhadap pihak-pihak dalam timbangtara sebelum ini di mana responden adalah satu pihak. Penimbangtara berpendapat bahawa En Oon tidak sepatutnya meletakkan diri beliau dalam kedudukan di mana terdapat risiko pelanggaran kerahsiaan atau privasi. Sekiranya beliau terus menjadi peguam bagi pihak pemohon dalam timbangtara semasa, tidak mungkin terdapat kerahsiaan timbangtara terdahulu dapat dikekalkan, menurut pendapat penimbangtara. Penimbangtara juga memutuskan bahawa En Oon, yang merupakan seorang peguambela dan peguamcara yang beramal di Mahkamah Tinggi Malaya adalah terikat dengan Akta Profesyen Undang-Undang 1976 dan Kaedah-Kaedah (Amalan dan Etika) Profesyen Undang-Undang 1978, khususnya kk 4 dan 5(a). Pemohon oleh itu telah memohon kepada Mahkamah Tinggi untuk mengenenipkan award interim tersebut dengan menghujahkan bahawa penimbangtara tersebut tiada bidang kuasa untuk membuat award sedemikian dan seterusnya menghujahkan bahawa telah berlaku pelanggaran rukun-rukun keadilan asasi. Ia juga telah dihujahkan bagi pihak pemohon bahawa Akta Profesyen Undang-Undang 1976 dan Kaedah-Kaedah tersebut tidak terpakai ke atas prosiding timbangtara tersebut mengikut autoriti *Zublin Muhibbah Joint Venture v Government of Malaysia* [1990] 3 MLJ 121.

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Diputuskan, menolak permohonan pemohon dengan kos:

- (1) Award penimbangtara boleh diketepikan jika terdapat kesilapan-kesilapan undang-undang pada dasarnya, meskipun bidang kuasa tersebut tidak boleh digunakan sewenang-wenangnya.

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Penimbangtara mempunyai, secara am, satu budi bicara berhubung cara timbangtara boleh dikendalikan. Mahkamah tidak akan mengkaji semula budi bicara penimbangtara dengan syarat tindakan-tindakan beliau dalam bidang kuasanya dan menurut prinsip-prinsip keadilan dan berkelakuan adil terhadap setiap pihak. Berdasarkan fakta-fakta berikut, Mahkamah Tinggi

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tidak diyakinkan bahawa penimbangtara telah salah laku atau prosiding atau timbangtara atau penimbangtara atau award tidak diperolehi dengan betul. Penimbangtara tersebut mempunyai

- bidang kuasa dan kuasa untuk menentukan persoalan-persoalan yang ditimbulkan oleh responden (lihat ms 210E–F, 211A). A
- (2) Keadaan-keadaan dalam *Zublin Muhibbah Joint Venture v Government of Malaysia* [1990] 3 MLJ 121 adalah berbeza dengan keadaan dalam kes semasa. Dalam kes semasa, persoalannya adalah berkaitan perlakuan dan kewajipan seorang peguambela dan peguamcara. Seorang peguambela dan peguamcara mempunyai kewajipan yang sama terhadap anakguam atau bekas anakguamnya sama ada atau tidak beliau di hadapan mahkamah atau prosiding timbangtara. Beliau hendaklah mengelakkan daripada apa-apa konflik kepentingan. Beliau hendaklah memastikan bahawa maklumat sulit yang beliau perolehi daripada hubungan beliau dengan anakguam beliau tidak digunakan kemudiannya terhadap anakguam beliau dalam apa-apa keadaan. Ini adalah penting untuk pentadbiran keadilan yang betul, seorang anakguam sepatutnya mempunyai keyakinan penuh bahawa apa yang beliau beritahu dan berikan kepada peguam beliau akan kekal satu rahsia. Oleh itu berdasarkan fakta-fakta berikut, penimbangtara tidak salah dalam membuat keputusan bahawa En Oon tidak sepatutnya bertindak sebagai peguam dan firma Tetuan CK Oon & Co tidak sepatutnya bertindak sebagai peguamcara bagi pihak pemohon dalam prosiding timbangtara semasa (lihat ms 212C–E); *Zublin Muhibbah Joint Venture v Government of Malaysia* [1990] 3 MLJ 121 dibeza. B
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- (3) Hujah-hujah bahawa terdapat pelanggaran rukun-rukun keadilan asasi hanya satu pengataan. Berdasarkan fakta-fakta, kedua-dua pihak telah diberikan peluang yang sama untuk mengemukakan hujah-hujah mereka yang membawa kepada penerbitan award interim tersebut (lihat ms 212G).] F

Notes

- For cases on the duty to clients generally, see 9 *Mallal's Digest* (4th Ed, 1999 Reissue) paras 1560–1572.
- For cases on conflict of interests, see 9 *Mallal's Digest* (4th Ed, 1999 Reissue) paras 1563–1566. G
- For cases on setting aside of awards, see 1 *Mallal's Digest* (4th Ed, 19998 Reissue) paras 957–959.

Cases referred to

- AC Ho Sdn Bhd v Ng Kee Seng (t/a Konsultant Senicipta)* [1998] 2 MLJ 393 (refd) H
- Hopper, Re* [1867] LR 2 QB 367 (refd)
- Lian Hup Manufacturing Co Sdn Bhd v Unitata Bhd* [1994] 2 MLJ 51 (refd)
- Mediterranean, etc Co Ltd v Fortress Fabric Ltd* [1958] 2 All ER 186 (refd) I
- Zublin Muhibbah Joint Venture v Government of Malaysia* [1990] 3 MLJ 121 (distd)

A Legislation referred to

Arbitration Act 1952 s 24(2)

Legal Profession Act 1976

Legal Profession (Practice and Etiquette) Rules 1978 rr 4, 5(a)

Rules for Arbitration r 11(a)(iii)

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Oon Chee Kheng (CK Oon & Co) for the applicant.

CC Low (Low Kian Leong & Co) for the respondent.

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Raus Sharif J: This is an application by the applicant for an order that the interim award dated 11 April 2002 published by the arbitrator. Dr Ooi Teik Aun (“the learned arbitrator”) in an arbitration between the applicant and the respondent to be set aside pursuant to s 24(2) of the Arbitration Act 1952 (“the Act”).

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The respondent is the Turnkey Contractor for the Ampang Kuala Lumpur Elevated Highway (“the project”). The applicant is the sub-contractor of the respondent. The applicant was appointed by the respondent as the subcontractor for the construction of piled foundations for the project under six separate subcontracts. Disputes arose between both parties and the applicant issued notices to arbitrate. On 3 September 2001, the learned arbitrator with the agreement of both parties, was appointed by the Director of the Regional Centre of Arbitration as the arbitrator. The applicant for the purpose of the arbitration proceeding appointed Mr Oon Chee Kheng of Messrs CK Oon & Co to act as their solicitors.

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In the first preliminary meeting convened by the learned arbitrator on 12 November 2001, the respondent raised a preliminary objection that Messrs CK Oon & Co be not permitted to act as solicitors for the applicant in the said arbitration. The respondent’s objection arises from the fact that Mr Oon Chee Kheng, was the legal counsel for the purpose of providing legal advice to another arbitrator on a legal issue raised as a preliminary issue in another arbitration involving the respondent and its appointed consultant (“the earlier arbitration”). In the earlier arbitration, the claim was made against the respondent was also pertaining to service for the same project, to which various issues, claims and defences were raised. Thus, the preliminary issues, very simply put before the learned arbitrator was, can Mr CK Oon who was appointed as legal counsel to the arbitrator in the earlier arbitration and therefore, privy to the proceedings subsequently act for the applicant against the respondent. To determine this preliminary issue, the learned arbitrator directed that written submission on the preliminary objection to be filed by both parties. Thus, written submissions were filed by the respondent and the applicant relating to the preliminary objection. The learned arbitrator after considering the written submissions of both parties published an interim awards where he concluded as follows:

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BE IT KNOWN that I hereby award and direct that:

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- 1 Mr CK Oon should not act as a counsel and the firm of Messrs CK Oon & Co as solicitors for the Claimant with the Present Arbitration and that both should withdraw from their appointment as the same with immediate effect.

- 2 The costs of this Interim Award and reference of this Preliminary Issue inclusive of that relating to the submissions as to the question of costs are to be borne by the Claimant.

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The cost of this Interim Award is RM8,900. The costs of the reference shall be taxed by me within twenty-eight (28) days from the date of this Interim Award or such other time as may be agreed between the parties and thereafter becomes payable by the Claimant to the Respondent with immediate effect upon the publication of my assessment thereto.

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The above is the interim order that the applicant sought to set aside. It is submitted by the learned counsel for the applicant that the learned arbitrator has no jurisdiction or authority to make such an award and in deciding as he did and if it were to be enforced, will effectively operate as an injunction preventing Messrs CK Oon & Co and Mr Oon Chee Kheng from acting as solicitors and counsel for the applicant. Learned counsel also submitted that there has been breaches of the rules of natural justice. According to learned counsel that the honorable arbitrator had, on 28 January 2002, viewed certain documents and drawings submitted by the respondent in the presence of, among others, Mr Oon Chee Kheng acting for the applicant. The objection by Mr Oon that without the presence of a representative from the applicant, Mr Oon would not be able to vouch for its authenticity and would not be able to answer questions relating to these questions and documents, did not find favor with the honorable arbitrator and the learned arbitrator only directed questions during the viewing of the documents and drawings to the respondent.

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As stated earlier, this application was brought under s 24(2) of the Arbitration Act 1952 which read:

Where an arbitrator or umpire has misconducted himself or the proceedings or an arbitration or award has been improperly procured, the High Court may set the award aside.

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The court's approach in the cases of this nature is well established. It is an established principle that an arbitrator's award may be set aside for errors of law on the face of it, though the jurisdiction is not lightly to be exercised (see Vol 2 of *Halsbury's Law of England* (4th Ed) para 623). The arbitrator has, in general, a discretion as to the manner in which the arbitration is to be conducted. The court will not review the arbitrator's discretion, provided he acts within his authority and according to the principles of justice and behaves fairly to each party (see *Mediterranean, etc Co Ltd v Fortress Fabric Ltd* [1958] 2 All ER 186). In the case of *Re Hopper* [1867] LR 2 QB 367, Cockburn CJ said:

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I would observe that we must not be ever ready to set aside awards where the parties have agreed to abide by the decision of a tribunal of their own selection unless we see that there has been something radically wrong and vicious in the proceeding.

The above principle was followed by Zakaria Yatim J (as he then was) in *Lian Hup Manufacturing Co Sdn Bhd v Unitata Bhd* [1994] 2 MLJ 51 and by Mahadev Shankar JCA in the case of *AC Ho Sdn Bhd v Ng Kee Seng (t/a Konsultant Senicipta)* [1998] 2 MLJ 393.

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A Thus, following the said principles and on the facts of this case, I am not persuaded to hold that the learned arbitrator has misconducted himself or the proceedings or the arbitration or award has been improperly procured. To me, the learned arbitrator has the jurisdiction and power to determine the preliminary issues raised by the respondent. The jurisdiction and power is given by r 11(a)(iii) of the Rules for Arbitration which read:

B The Arbitrator shall have power to

(iii) determine any question of law (apart from a special case to be determined by the High Court) or fact arising in the arbitration.

C To me the issue whether Mr Oon Chee Kheng of Messrs CK Oon & Co should be disqualified from representing the applicant, is an issue relating to the law and fact arising from the arbitration. The learned arbitrator in his findings in favor of the respondent on the proceeding held that since Mr CK Oon was appointed as legal counsel to give a legal opinion to the arbitrator in the earlier arbitration, he and his firm should not act against the respondent in this arbitration. The learned arbitrator gave his reasons by saying that Mr CK Oon was privy to documents related to the earlier arbitration and owed a duty to the parties in the earlier proceeding which one of the parties is the respondent. According to the learned arbitrator, Mr CK Oon should not put himself in a position where there will be a risk for breach of confidentiality or privacy and if Mr CK Oon continues as counsel for the applicant there is no certainty that the confidentiality and privacy of the earlier arbitration will be duly preserved. According to him

E Mr CK Oon as practicing advocate and solicitor of the High Court of Malaya is bound by the Legal Profession Act 1976 and the Legal Profession (Practice and Etiquette) Rules 1978, in particular rr 4 and 5(a) of the said Legal Profession Rules which he produced and read as follows:

F 4 No advocate and solicitor to accept brief if professional conduct likely to be impugned.

No advocate and solicitor shall accept a brief in a case where he knows or has reason to believe that his own professional conduct is likely to be impugned.

G 5 No advocate and solicitor to accept brief if difficult to maintain professional independence.

(a) No advocate and solicitor shall accept a brief if such acceptance renders or would render it, difficult for him to maintain his professional independence or is incompatible with the best interest of the administration of justice.

H It is submitted for the applicant that the Legal Profession Act 1976, and hence, the Rules, did not apply to arbitrators. The case of *Zublin Muhibbah Joint Venture v Government of Malaysia* [1990] 3 MLJ 121, where Eusoff Chin J (as he then was) said (at p 176):

I [T]he law governing proceedings in Malaysia is the Arbitration Act 1952 (Rev 1972) which came into force in Sarawak on 17 June 1952, and other states on 1 November 1972, and that the Legal Profession Act 1976 has no application to arbitration proceedings in West Malaysia was cited by learned counsel to support his argument.

With respect, I am unable to agree with the learned counsel's submission. I find that the issue raised in that case is different from the present case. In *Zublin Muhibbah's* case, Eusoff Chin J was making a ruling on an issue whether an American attorney who was retained by the plaintiff to assist the solicitors in the cross-examination of a witness is prohibited from appearing in an arbitration proceedings because he was not an advocate and solicitor under the Legal Profession Act 1976. Earlier, counsel for the defendant had objected to the presence of the American attorney. It is in that context that Eusoff Chin J decided that there is no necessity for the American attorney, to become an advocate and solicitor under the Legal Profession Act 1976, in order to appear in the arbitration proceedings. But the issue in the present case is not similar. In the present case, the issue is with regard to the conduct and duty of an advocate and solicitor. To me, an advocate and solicitor owes the same duty to his client or former client whether or not he is before the court or an arbitration. He must avoid any conflict of interest. He must ensure that confidential information he obtained from the relationship with his client, is later not used against his client in any circumstances. This is important because for the proper administration of justice a client should be able to have complete confidence that what he tells or gives his lawyer will remain a secret.

Thus, I am of the view that the learned arbitrator was not wrong in coming to the conclusion that Mr Oon Chee Kheng should not act as a counsel and the firm Messrs CK Oon & Co, as solicitors for the applicant in the arbitration. To me there is no error on the face of the findings of the learned arbitrator.

It is also alleged by the learned counsel for the applicant that the findings of the learned arbitrator on the above issue is related to disputes not covered by their original agreement on the matter to be arbitrated. But from the facts of this case, the parties have agreed that the preliminary issue to be determined by the learned arbitrator and an interim award to be published. Written submissions were submitted by both parties to assist the learned arbitrator as to arrive to his decision. Now it is too late in the day for the applicant after being handed with the interim award not to his favor, to complain that the learned arbitrator lacked jurisdiction.

On the submission by the learned counsel for the applicant that there has been breaches of the rule of natural justice, I find that it is a mere allegation. On the facts, both parties were given equal opportunities to present their arguments, which led to the publication of the interim award by the learned arbitrator.

Accordingly, the applicant's application is dismissed with costs.

Applicant's application dismissed with costs.

Reported by Andrew Christopher Simon